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IBU KOTA DUCTILE IRON PIPE INDUSTRY SDN BHD & ANOR v. BANK PEMBANGUNAN MALAYSIA BHD & ORS

HIGH COURT MALAYA, IPOH
SU TIANG JOO JC
[CIVIL SUIT NO: AA-21C-1-05-2018]
B 23 MAY 2023

Abstract – *Relief, in a case of innocent misrepresentation, does not sound in damages but compensation on a quantum meruit basis without any interest as award of interest would amount to an award of damages.*

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CONTRACT: *Breach – Oral agreement – Liability – Chief Minister – Representation by Chief Minister led company to invest by constructing factory – Whether representation in official capacity – Whether could be sued upon contract made in personal capacity – Whether contract binds successors of office*

D

CONTRACT: *Breach – Oral agreement – Representation – Innocent misrepresentation – Relief – Whether in equity – Whether contract void for uncertainty – Whether person receiving advantage under void agreement bound to make compensation or restitution – Whether assessment of compensation on quantum merit basis*

E

CONTRACT: *Privity – Existence – Oral agreement – Alleged representation led company to invest by constructing factory – Action by director and shareholder of company – Whether cause of action and injury sought to be vindicated clearly pleaded – Whether director stranger to contract – Whether injury distinct from injury to company*

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The first plaintiff ('P1'), a private limited company and the second plaintiff ('P2'), a director and shareholder of P1, sued the fourth to seventh defendants ('D4 to D7') for breach of an alleged representation made during a meeting held on 30 March 2006 which led P1 to invest in the State of Perak by
G constructing a factory to produce and sell iron ductile piles. The plaintiffs took a loan to the tune of RM133.8 million. The representation alleged to have been made by the fifth defendant ('D5'), the then Chief Minister ('CM'), was that the State Government of Perak ('D7') would provide the infrastructure in the form of access roads and supply of water, natural gas and
H 132 kV electricity to P1's proposed factory. The representation was made orally which resulted in an alleged oral contract. The plaintiffs claimed that despite the repeated requests, D4 to D7 did not honour the alleged oral contract by failing to provide the infrastructure as promised to its factory that was being built. The plaintiffs' claim against the defendants was for damages
I in the sum of more than RM1.95 billion for breach of the alleged oral contract. D4 to D7 categorically denied that D5 had made the

representation. The core issue herein was whether there was such a representation made on 30 March 2006 which resulted in the alleged oral contract and was there a breach of the alleged oral contract, and if so, what was the relief to be awarded to the innocent party.

Held (allowing plaintiffs' claim in part):

(1) Under the doctrine of privity of contract, a stranger to a contract acquires no right and suffers no liability under the contract. P1, as a private limited company, has a legal persona separate from its directors and shareholders. P2, by suing in his capacity as a director, was in fact suing as a representative of P1 and if he was suing as a shareholder, he was in fact suing for reflective losses. However, beyond asserting that he was suing as a shareholder and director of P1, P2 was not able to clarify what was P2's cause of action and what was the real injury that P2 sought to vindicate and whether that injury was distinct from the injury to that of the company. Consequent to the lack of pleadings and absence of evidence or submissions on the existence of any exception against the rule against reflective loss being applicable in favour of P2, P2's claim was dismissed. (paras 28, 30 & 34-36)

(2) At the time of the meeting, on 30 March 2006, D5 was the *de jure* Menteri Besar of the State of Perak and had attended and made representations at the meeting in that official capacity. Under the Government Contracts Act 1949 ('GCA'), no public officer shall be liable to be sued personally upon any contract which he makes in that capacity. Therefore, D4 and D6, as public officers under the GCA with D6 being the successor of D5 as the CM of Perak, had no personal liability under the alleged oral contract. The claims against them were dismissed. (paras 39-41)

(3) Merely because the parties contemplate the preparation of a formal contract, that, by itself would not prevent a binding contract from coming into existence before the formal contract is signed. P1 had proven, on a balance of probabilities, that the representation was made by D5 acting on behalf of D7 to P2, who was acting and representing P1 on 30 March 2006. Further, if a person states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it, if he meant to dispute the fact that he did so agree. Given the large amount of costs involved in the investment being made in the instant case, the lack of reply by D7 to P1's letters, asserting that D7 had made the representation, D7 was taken to have agreed to the same. (paras 43-45 & 51)

(4) A representation was made, and it was one of innocent misrepresentation where the relief lies in equity. In the representation made on 30 March 2006, no timelines were made as to when the

infrastructure would be supplied and what were the specifications of the infrastructure and how they were to be supplied. The alleged contract was not certain or capable of being made certain and therefore, was void for uncertainty. Any person who received any advantage under an agreement discovered to be void is bound to make compensation or restitution. In the circumstances, P1 had succeeded in its claim for a declaratory order against D7 on the representation and ordered to be compensated by way of restitution for costs incurred in constructing any part of the infrastructure as promised in the representation on a *quantum meruit* basis as to be assessed. (paras 59, 60 & 66)

Case(s) referred to:

Admiral Cove Development Sdn Bhd v. Balakrishnan Devaraj & Anor [2011] 9 CLJ 133 FC ***(refd)***

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***

Emperee Industries Sdn Bhd v. Genagco Sdn Bhd [1987] 1 CLJ 477; [1987] CLJ (Rep) 591 HC ***(refd)***

Gerard Jude Timothy Pereira v. Kasi KL Palaniappan [2017] 1 LNS 889 CA ***(refd)***

Halim Saad v. Chan Yok Peng [2021] 1 CLJ 499 CA ***(refd)***

Ho Yew Kong v. Sakae Holdings Ltd [2018] SGCA 33 ***(refd)***

Mak Siew Wei v. Yeoh Eng Kong & Other Appeals [2019] 7 CLJ 470 CA ***(refd)***

Mohd Khir Toyo lwn PP [2013] 5 CLJ 323 CA ***(refd)***

Mohd Zin Omar & Anor v. Jentayu Padu Sdn Bhd [2017] 1 LNS 403 CA ***(refd)***

Paramill Sdn Bhd & Anor v. Datuk Joseph Pairin Kitingan [2007] 6 CLJ 192 CA ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

PP lwn. Dato' Seri Mohd Khir Toyo [2012] 3 CLJ 885 HC ***(refd)***

PP v. Datuk Hj Harun Hj Idris (No 2) [1976] 1 LNS 184 HC ***(refd)***

Ranjeet Singh Sidhu & Anor v. Zavarco Plc & Ors [2016] 2 CLJ 975 HC ***(refd)***

Sediperak Sdn Bhd v. Baboo Chowdhury [1999] 5 CLJ 31 HC ***(refd)***

Sik Hong Photo Sdn Bhd v. Ch'ng Beng Choo [2010] 5 CLJ 427 CA ***(refd)***

Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***

Simfoni Maya Sdn Bhd v. Kperak Implementation And Coordination Corporation [2023] 1 LNS 88 HC ***(refd)***

Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA ***(refd)***

Small Medium Enterprise Development Bank Malaysia v. Lim Woon Katt [2016] 9 CLJ 73 CA ***(refd)***

Tan Eng Joo v. Sandeep Singh Grewal & Anor [2022] 6 CLJ 308 HC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 18, 30, 66

Government Proceedings Act 1956, s. 29(1)(a)

Penal Code, s. 165

Rules of Court 2012, O. 15 r. 4(1)

For the plaintiff - Arziah Mohamed Apandi & Mohd Akmal Mohd Ghazali; M/s Apandi Ali & Co
For the defendants - Hezlin Haldi & Siti Hanida Abdul Kadir; Legal Advisor, State of Perak

Reported by S Barathi

JUDGMENT

Su Tiang Joo JC:

Introduction

[1] The plaintiffs claim against the defendants for damages in the sum of more than RM1.95 billion for breach of an alleged oral contract made upon the representation of the Chief Minister of the State of Perak which led them to invest in the construction of a factory for the production of iron ductile pipes. Their investment costs included the taking of a loan of RM133.8 million.

[2] However, despite having constructed the factory up to 95% completion, it could not be commissioned due to lack of access roads, supply of water, natural gas and 132 kV electricity which the plaintiffs asserted the State of Perak through its Chief Minister had represented will be made available.

Parties To The Action

[3] The first plaintiff ("P1") is a private limited company incorporated in Malaysia.

[4] The second plaintiff ("P2") is a director and shareholder of P1.

[5] The first to the third defendants are no longer parties to this action after the Court of Appeal had allowed their appeals on 22 July 2021 to have the claims against them struck out.

[6] The seventh defendant ("D7") is the State Government of Perak, with the fourth defendant ("D4") its State Secretary, and the fifth defendant ("D5") and the sixth defendant ("D6") being her Chief Ministers at disparate periods of time.

Background

[7] In the writ of summons, in para. (d) and (e) (E191 pdf pp. 6 and 7), the plaintiffs sued D4 to D7 for breach of an (alleged) representation ("representation") made during a meeting held on 30 March 2006 which allegedly led P1 to relocate from Kedah and to invest in the State of Perak by constructing a factory to produce and to sell iron ductile pipes. It took a loan from Bank Pembangunan Malaysia Berhad to the tune of RM133.8 million.

[8] The representation alleged to have been made by D5 was that D7 will provide the infrastructure in the form of access roads and supply of water, natural gas and 132 kV electricity to P1's proposed factory.

[9] When the representation was made, D5 was the Chief Minister of D7, and who is described by the plaintiffs as the highest Executive officer of D7 (see E252 paras. 15 and 16 p. 29).

[10] The plaintiffs assert that this representation made orally on 30 March 2006 resulted in an alleged oral contract ("alleged oral contract").

[11] P1 then proceeded to purchase a piece of land known as Lot 2, Kawasan Perindustrian Kamunting Raya, Jalan Logam 6, 34600 Kamunting, Taiping, Perak held under H.S.(D) 35115 PT 27030 Daerah Larut dan Matang, Mukim Asam Kumbang, Negeri Perak (hereinafter referred to as "Lot 2") from Perbadanan Kemajuan Negeri Perak ("PKNP") and commenced the construction of its factory.

[12] It was made clear by learned counsel for the plaintiffs when presenting her oral submissions on 7 March 2023, that the plaintiffs' action in this case is not premised upon the sale and purchase agreement made between P1 and PKNP.

[13] The plaintiffs claimed that despite the repeated requests, D4 to D7 did not honour the alleged oral contract by failing to provide access roads, and the supply of water, gas and 132 kV electricity to its factory being built on Lot 2.

[14] Whilst trying to get D4 to D7 to honour the alleged oral contract, P1 expended monies to try to lay out the infrastructure itself. It was able to construct up to 95% of the factory but ran into financial difficulties with its financier recalling the loan and placing P1 into receivership.

[15] The plaintiffs then commenced this action for a declaration that D4 to D7 had made the representation and for breach of the alleged oral contract.

[16] The plaintiffs asserted that if D4 to D7 had made good on the representation, the factory would have been completed, production and sales of its iron ductile pipes would have commenced, and it would have been able to make an average annual gross profit of RM145,236,374 (see E191 p. 13 RM871,418,245 divided by six years).

[17] D4 to D7 categorically denied that D5 had made the representation. In fact, D5 who was called as a witness testified that he did not and would not have made such a representation.

Core Issue

[18] Although the plaintiffs postulated six issues and D4 to D7 one, with respect, in my considered opinion, the core issue is whether there was such a representation made on 30 March 2006 which resulted in the alleged oral contract, and was there a breach of the alleged oral contract, and if so, what is the relief to be awarded to the innocent party.

Court's Analysis And Findings

Liability

[19] From a careful perusal of the pleadings, save for a bare averment in para. 1A of the statement of claim (E191 pdf 10) that P2 is a director and shareholder of P1, it is not pleaded at all what his cause of action is and what is the injury or losses that he is seeking that is personal to him.

[20] During the presentation of oral closing submissions on 7 March 2023 (conducted online), when asked to clarify, Puan Arziah binti Mohamed Apandi, learned lead counsel for the plaintiffs, asserted that P2 is claiming on the basis that he is a director and shareholder of P1.

[21] From the written submissions filed, it was not clear whether the plaintiffs were suing on the premise of misrepresentation as provided under s. 18 of the Contracts Act 1950. The plaintiffs had, in their primary written submissions in para. 8 (E252 p. 25), asserted that "SD3 who is D5 had "misrepresented" through implied representation that the Perak State Government would supply the facilities"; and at para. 11 the plaintiffs asserted that the representation becomes a "misrepresentation". In fact, the plaintiffs even referred to s. 18 of the Contracts Act 1950 which is the governing provision on "misrepresentation" in their written submissions (para. 12 E 252 p. 27) as well as case authorities on this concept.

[22] Undoubtedly, this led D4 to D7 taking great pains to devote a substantial amount of efforts on the concept of misrepresentation in their written submissions (E254 paras. 43 to 47). And, D4 to D7 pointed out that there are three types of misrepresentation namely that of (i) fraudulent (which is a tort); (ii) negligent (which is a tort); and (iii) innocent (which comes under equity).

[23] However, during the presentation of oral submissions on 7 March 2023, learned lead counsel for the plaintiffs clarified that the plaintiffs are (not) suing on misrepresentation but are suing on the representation as pleaded in paras. 9 and 9(i) of the statement of claim (E191 p. 9) which led to the alleged oral contract made on 30 March 2006.

[24] Learned lead counsel for the plaintiffs conceded that D7 is the Government of the State of Perak. By reason thereto, besides the Contracts Act 1950, the Government Contracts Act 1949 ("GCA"), and the Government Proceedings Act 1956 ("GPA") would apply.

[25] Although learned senior federal counsel, Puan Hezlin binti Haldi, asserted that under the Federal Constitution, D5 who was indisputably the Chief Minister of D7 was not a public servant when the alleged oral contract was made.

[26] It was made clear by learned counsel for the plaintiffs on 7 March 2023 during closing submissions, that the plaintiffs' claim is founded on a representation having been made leading to an alleged oral contract having been made on 30 March 2006 between the P1 who was represented by its director (P2), and the State Government of Perak (D7) who was represented by D5, who was then her Menteri Besar.

P2's Claim As Well As Claims Against D4 To D6

[27] I will first deal with P2's claim and the claims against D4 to D6.

Doctrine Of Privity Of Contract

[28] It is trite law that under the doctrine of privity of contract, a stranger to a contract acquires no right and suffers no liability under the contract.

[29] In fact, from the evidence led, there was no evidence led to show what loss had been suffered by P2 in his capacity as a director and shareholder of P1.

[30] It is also trite law that P1 as a private limited company has a legal persona separate from its directors and shareholders. By suing in his capacity as a director, P2 is in fact suing as a representative of P1 and if he is suing as a shareholder, he is in fact suing for reflective losses. This will be discussed further below.

[31] Whilst I accept as did Justice Wong Kian Kheong JC (now JCA) in *Ranjeet Singh Sidhu & Anor v. Zavarco Plc & Ors* [2016] 2 CLJ 975 (HC) that O. 15 r. 4(1) of the Rules of Court 2012 ("ROC") allows two or more persons to be joined together in one action as plaintiffs or defendants where some common question of law or fact would arise and all rights to relief whether they are joint, several or alternative are in respect of or arise out of the same transaction or series of transaction, the plaintiffs ought to set out what are their respective rights to relief.

[32] In *Mak Siew Wei v. Yeoh Eng Kong & Others Appeals* [2019] 7 CLJ 470 (CA), Justice Nallini Pathmanathan JCA (now FCJ) held that "it is not in every instance that the rule against reflective loss precludes the joinder of a shareholder's personal action" but as observed by Justice Liza Chan Sow Keng JC (now J) in *Tan Eng Joo v. Sandeep Singh Grewal & Anor* [2022] 6 CLJ 308 at para. [20] after making reference to the Singapore CA case of *Ho Yew Kong v. Sakae Holdings Ltd* [2018] SGCA 33, where the facts present both personal wrongs and corporate wrongs, it has to be analysed as to:

(i) what is the real injury that the plaintiffs seek to vindicate?; and

(ii) is that injury distinct from the injury to the company.

[33] Although *Tan Eng Joo* (*supra*) is a company derivative action, the analysis would similarly apply in the instant case, and during closing submissions on 7 March 2023, I posed a query to learned counsel for the plaintiffs what is the real injury that P2 sought to vindicate and what is his injury that is distinct from the injury to the company.

[34] Beyond asserting that P2 was suing as a shareholder and director of P1, learned lead counsel for the plaintiffs was not able to clarify what was P2's cause of action, if any, and what is the real injury that P2 seeks to vindicate, and whether that injury is distinct from the injury to that of the company (P1).

[35] Further, besides the lack of pleadings, there was no evidence led nor submissions presented on the existence of any exception against the rule against reflective loss being applicable in favour of P2.

[36] In the circumstances, P2's claim is dismissed.

[37] By the same token, the plaintiffs were unable to persuade this court as to why the alleged representation said to have been made by D5 on behalf of D7 would make him personally liable under the oral contract said to be made on 30 March 2006 by P1 with D7.

[38] In fact, as mentioned earlier, the plaintiffs aptly described D5 as being not an ordinary man but one who held the highest office in the Executive branch of the Perak State Government and it was due to the promises of D5 (SD3) as the Chief Minister or as is commonly known as the Menteri Besar of Perak that caused the plaintiffs to have invested more than RM334 million to build a factory (see E252 paras. 15 and 16 p. 29). In *PP lwn. Dato' Seri Mohd Khir Toyo* [2012] 3 CLJ 885; [2012] 3 AMR 66 (HC) and upheld on appeal [2013] 5 CLJ 323 (CA), the accused who was the Menteri Besar of Selangor was held to be a public servant holding the highest Executive office of the State at the time of committing the offence under s. 165 of the Penal Code and sentenced to 12 months imprisonment with his property forfeited in favour of the Government.

[39] That D5 may no longer be the Chief Minister soon after the State Elections in 2008 does not detract from the fact that at the time of the meeting held on 30 March 2006, he was the *de jure* Menteri Besar of the State of Perak and had attended and made representations at the meeting in that official capacity. As the Menteri Besar, he was the *de jure* chief public officer of the State Government, see: *PP v. Datuk Hj Harun Hj Idris (No 2)* [1976] 1 LNS 184; [1977] 1 MLJ 15.

[40] Under the Government Contracts Act 1949 which applies to both the Federal and the State Government, no public officer shall be liable to be sued personally upon any contract which he makes in that capacity. Just like D5, D4 and D6 are similarly, in my considered view, public officers under the Government Contracts Act 1949 with D6 being the successor of D5 as Chief Minister of D7.

[41] Wherefore, just as P2 have no rights in his personal capacity under the alleged oral contract, D4 to D6 have no personal liability under the alleged oral contract, and the claims against them are dismissed.

Representation – P1 And D7

[42] I now turn to whether D7 had made the representation favouring P1.

[43] Having perused the evidence led, in particular:

(i) the letter of 29 March 2013 by Dato' Chang Ko Youn (PW2) to D6 who was the then Menteri Besar of D7, and which was produced and admitted as exh. P7 (CBOD bundle D) (E202 p. 93);

(ii) that PW2 was the Executive committee member of D7 at the time he issued his letter of 29 March 2013 (P7) to D6 who succeeded D5 as Menteri Besar of D7. PW2's designation then was "Penasihat Hal Ehwal Kaum Cina Kepada Y.A.B. Menteri Besar Perak" (advisor in Chinese affairs to the Chief Minister of Perak);

(iii) that PW2 had attended the meeting of 30 March 2006;

(iv) in his letter (P7) to D6, PW2 wrote as follows:

> Untuk makluman Y.A.B. Dato' Seri Diraja, bekas Menteri Besar Perak yang lalu telah menjemput syarikat ini untuk melabur di Kamunting Raya Industrial Estate **dengan jaminan untuk menyediakan kemudahan infrastruktur termasuk bekalan eletrik 132kv.** (emphasis added)

(v) the minutes of the meeting held on 29 March 2010 chaired by Dato' Chang Ko Youn representing D7, and attended by representatives from PKNP, TNB and Bank Pembangunan Malaysia Berhad and P1 to understand, streamline and agree in solving various infrastructure, amenities and relevant problems faced by P1 (E202 pp. 47 and 48 at p. 47 item 1 f) minuted that:

> IKIDIP (P1) reported to be correct and true that the former Barisan Nasional Menteri Besar had sincerely promised the company in his invitation to invest in Kamunting Raya Industrial Estate that all the above facilites and amenities were to be provided for under the Perak State jurisdiction and that the full co-operation and assistance would be given for the successful implementation of the abovementioned issues; and

(vi) the lack of reply to the repeated letters by P1 making the assertion that D7 had made the representation and which letters were issued to D7 including its officers such as D6 and calling upon them to make good on the representation, A

in my judgment, P1 has proved on a balance of probabilities that the representation was made by D5 acting on behalf of D7 to P2 who was acting and representing P1 on 30 March 2006. B

[44] On D7's failure to reply, I invoke and apply the maxim "*qui tacet consentire videtur, ubi loqui debuit ac potuit*" (He who is silent, when he ought to have spoken and was able to, is taken to agree.) In short – silence gives consent. C

[45] There is a plethora of authorities for the principle that if a person states in a letter to another he has agreed to do certain things, the person who receives that letter must answer it, if he means to dispute the fact that he did so agree *ie*, it would be reasonable to expect a vigorous denial. Although these cases are commercial cases, in my considered opinion, given the large amount of costs involved in the investment being made in the instant case, this principle applies with equal force here. D

[46] See:

(i) *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155; [1995] 3 MLJ 283 (CA); E

(ii) *Small Medium Enterprise Development Bank Malaysia v. Lim Woon Katt* [2016] 9 CLJ 73; [2016] 5 MLJ 220 (CA);

(iii) *Gerard Jude Timothy Pereira v. Kasi KL Palaniappan* [2017] 1 LNS 889; [2017] 6 MLJ 54 (CA); F

(iv) *Mohd Zin Omar & Anor v. Jentayu Padu Sdn Bhd* [2017] 1 LNS 403; [2017] MLJU 407 (CA)

(v) *Halim Saad v. Chan Yok Peng* [2021] 1 CLJ 499; [2021] 3 MLJ 717 (CA); G

(vi) *Emperee Industries Sdn Bhd v. Genagco Sdn Bhd* [1987] 1 CLJ 477; [1987] 1 CLJ (Rep) 591 (HC);

(vii) *Sediperak Sdn Bhd v. Baboo Chowdhury* [1999] 5 CLJ 31; [1999] 5 MLJ 229 (HC); and H

(viii) *Simfoni Maya Sdn Bhd v. Kperak Implementation And Coordination Corporation* [2023] 1 LNS 88 (HC).

[47] In my considered view, the weight of the contemporaneous documents evidencing the representation having been made far outweighs the oral denial given by D5 who is also sued in his personal capacity. In *Paramill Sdn Bhd* I

& Anor v. Datuk Joseph Pairin Kitingan [2007] 6 CLJ 192; [2007] 7 MLJ 289, the Court of Appeal at para [52] after referring to the guidance by Chang Min Tat FJ in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 (FC) gave the following guidance on balancing the probative value of the recollection of an interested witness against contemporaneous correspondence:

> In our case, the learned judge seemed to take the contrary view in giving preference to the unsubstantiated belief and recollections of the respondent who had a purpose of his own to serve instead of the oral testimony of independent witnesses as corroborated by the contemporaneous correspondence.

[48] At the risk of repetition, from the evidence led, P1 had in fact relied upon the representation and had in fact repeatedly called upon D7 to honour its obligation made in the form of the said representation made by the highest Executive officer of D7, which led to P1 taking two loans totalling RM133.8 million and proceeding with the construction of its factory.

[49] As it turned out, D7 turned a deaf ear to the pleas of P1, content to pass the pleas from one agency to the other and purport to wash its hands off the representation it has made by asserting that it has no power over the local council, Majlis Perbandaran Taiping, on roads and drains, as well as the statutory body, Lembaga Air Perak which oversee water supply, Lembaga Gas Malaysia which oversee the supply of gas, and the public utility company, Tenaga Nasional Berhad which would oversee the supply of 132 kV electricity.

Alleged Oral Contract

[50] The next critical issue that calls for determination by this court is whether the representation make up contractual obligations between P1 and D7. P1 asserted this led to an oral contract but D7 denies the same.

[51] In answering this critical issue, I find the findings in the Supreme Court in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133; [1994] 2 MLJ 754 (SC) to be instructive. I gratefully adopt and set out the summary of this case made by the editor of the esteemed law publisher, the Malayan Law Journal as follows:

(i) the respondent, YC Chin Enterprises Sdn Bhd ('YC Chin'), had entered into negotiations to construct low-cost houses and shophouses ('the project') for the workers of the appellant, Ayer Hitam Tin Dredging Malaysia Bhd ('AHTD'). AHTD wrote a letter to YC Chin on 19 September 1984 ('the letter'), accepting their proposals in respect of the project, subject to certain terms and conditions, one of which was that the terms and conditions in the letter were to be constituted in an agreement between YC Chin and AHTD and that appropriate indemnity clauses in favour of AHTD be incorporated in the agreement;

(ii) in reliance upon the letter, YC Chin proceeded to perform some of their obligations stated therein, although no formal agreement in writing had been executed. Subsequently, AHTD instructed YC Chin to cease all work, stating their intention to discontinue negotiations and that any work done had been entirely at YC Chin's risk. AHTD contended that the work had been done before the coming into being of any contract and that the letter was part of ongoing negotiations for a future agreement. On the other hand, YC Chin submitted that all essential terms had been agreed and all that remained to be done was to put the terms into the form of a contract. The trial judge found that there was a contract and allowed YC Chin's claim for breach. AHTD appealed; and

(iii) the primary issue was whether there was a concluded contract between the AHTD as employer and YC Chin as contractor.

[52] In *YC Chin Enterprises Sdn Bhd* (*supra*), Edgar Joseph Jr speaking for the Supreme Court said, and I quote the learning contained therein *in extenso* which I find most helpful in determining the critical issue of whether there is or there is no contract in this instant case:

> In *Smith v. Hughes* 1 it was said that the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement the parties must be *ad idem*, *ie* there must be a consensus between them.
>
> But, bearing in mind the familiar saying that a person's beliefs or his state of mind are just as much facts as the state of his digestion or the existence of a tangible object, from what factors may the existence of an agreement be inferred? The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract.
>
> In other words, in its task of ascertaining the intention of the parties, the court will, generally speaking, apply an objective test; more particularly, it will ask itself, what would the intention of reasonable men be if they were in the shoes of the parties to the alleged contract.
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> …
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> …
>
> *In the first place, we should like to make the observation that one would expect that a contract of this nature and magnitude involving as it does a very substantial financial commitment, to wit, RM14m, would be properly documented.*
>
> In the second place, turning to the letter of 19 September 1984, nowhere in it is there anything said as to:
>
> > when work on the project would commence or be completed; consequently, the ascertainment of damages for late delivery would become difficult. Similarly, the ascertainment of the defect liability period would also be difficult;

A what were the terms of 'the appropriate indemnity clauses' in favour of the defendant referred to in cl (vi) of the letter of 19 September 1984 – a matter of no little importance to the defendant bearing in mind that so far as it was concerned, liability was being incurred in respect of a not insubstantial sum of money and the project was non-profitable;

B what the price of the individual units of dwelling houses would be, though it did say that this would have to be approved by the Jawatankuasa Tetap Kebajikan Pekerja-Pekerja Ladang dan Lombong Selangor;

C the number of dwelling houses and shophouses to be constructed and where the dwelling houses were to be constructed; and

the identity of the purchasers of the dwelling houses.

…

…

D It will also be recalled that although the letter of 19 September 1984 stated that a copy of the draft agreement would be forwarded by the defendant to the plaintiff no such draft was ever forwarded.

True it is that merely because the parties contemplate the preparation of a formal contract, that by itself will not prevent a binding contract from coming into existence before the formal contract is signed. It is not difficult to cite an anthology of cases for this proposition but we need no more than refer to *Von Hatzfeldt-Wildenburg v. Alexander* (1912) 1 Ch 284 at pp. 288, 289 where the court said this:

F It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored.

H In *Branca v. Cobarro* (1947) KB 854; [1947] 2 All ER 101, the agreement entered into by the parties contained a clause as follows: 'This is a provisional agreement until a fully legalized agreement, drawn up by a solicitor and embodying all the conditions herewith stated, is signed.' It was held by the Court of Appeal that a binding agreement had come into effect.

I

But it is now well settled that when an arrangement is made 'subject to contract' (see *Rossdale v. Denny* (1921) 1 Ch 57; (1921) 90 LJ Ch 2014, or 'subject to the preparation and approval of a formal contract' (see *Winn v. Bull* (1877) 7 Ch D 297) and similar expressions, it will generally be construed to mean that the parties are still in a state of negotiation and do not intend to be bound unless and until a formal contract is exchanged.

We say 'generally' because in exceptional circumstances, the 'subject to contract' formula will not be so intractable as always and necessarily to prevent the formation of a contract. (See, for example, *Richards (Michael) Properties Ltd v. Corp of Wardens of St Saviour's Parish Southwark* (1975 2 All ER 416; *Alpenstow Ltd v. Regalian Properties plc,* 8 *Filby v. Hounsell* (1985) 2 All ER 545; (1985) 1 WLR 721.

We hasten to add, however, that in both *Richards* and *Alpenstow*, the court made it clear that nothing in the judgment was intended to throw doubt on the effect in law of the time-honoured expression 'subject to contract'. Indeed, in *Chinnock v. Ely (Marchioness)* 10 at p 646, Lord Westbury said this:

… if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.

We must next refer to the recent decision in *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* [1994] 1 MLJ 108 cited to us, for the proposition, *inter alia*, that the making of a sale and purchase agreement to also include 'other usual terms and conditions' remained largely a matter of conjecture and creates uncertainty. In this context, we have reminded ourselves of the much-quoted observations made by Lord Halsbury in *Quinn v. Leathem* (1901) AC 495 at p. 506 that:

… every judgment must be read as applicable to the particular facts proved, … since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. … a case is only an authority for what it actually decides.

Thus, the proposition in the *Kam Mah Theatre* case to which we have referred, must be read subject to the consideration that in that case the alleged agreement comprised in a letter in respect of which specific performance had been sought, contained the vital qualifying clause:

… provided that the sale and purchase agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989

otherwise the aforesaid sum of RM90,394.20 (equivalent to 5% of the purchase price) shall be refunded to you free of interest without demand forthwith …

In the event, pursuant to the qualifying clause in the letter, the so-called deposit fell to be refunded to the purchaser as no sale and purchase agreement was ever signed. In such a situation, the High Court of Australia in *Masters & Anor v. Cameron* (1954) 91 CLR 353 – an authority uncovered in the final stages of the preparation of this judgment – we would interpolate, said this:

… From the fact that a so-called deposit was paid upon the signing of a document which left each party free to decide against entering into a binding contract the *prima facie* inference is that the intention was to provide a sum which should take on the character of a deposit upon the making of a contract, but in the meantime should not become the property of the intending vendor.

For the avoidance of doubt, however, we would add that the proposition in the *Kam Mah Theatre* case should not be construed as detracting from certain well-known principles enunciated in three cases to which we shall now refer, namely, *Cavallari v. Premier Refrigeration Co Pty Ltd* (1952) 85 CLR 20: 25 ALJ 187; *Love & Steward Ltd v. Instone (S) & Co Ltd* (1917) 33 TLR 475 and *Harichand v. Govind Luxman Gokale* (1922) LR 50 IA 25.

In *Cavallari* 14 the High Court of Australia said this at p. 25:

… while the due course of completion of a contract for the sale of land is a matter of some complexity, involving the doing of a number of things by both parties, it is very well settled that an informal or 'open' contract not dealing expressly with any of these matters of detail, may be made and be binding. In such a case law and equity fill in the details, so to speak, providing by way of implication for whatever is necessary to effectuate due performance.

Similarly, in *Love & Stewart*, Lord Loreburn said this at p. 476:

It was quite lawful to make a bargain containing certain terms which one was content with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up with the full expectation that one would by consent insert in it a number of further terms. *If that were the intention of the parties, then a bargain had been made, none the less that both parties felt quite sure that the formal document could comprise more than was contained in the preliminary bargain.* But if the intention were that what was agreed in the first instance should be subject to the completion of the formal document, then there was no bargain while that condition remained unfulfilled.

Another illustration of what Lord Loreburn had in mind may be found in the Indian Privy Council case of *Harichand* 16 when Mr Ameer Ali, speaking for their Lordships of the Board said this at p. 31:

… Here exhibits A and A1 show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. The reservation in respect of a formal document to be prepared by a vakil only means that it should be put into proper shape and in legal phraseology, *with any subsidiary terms that the vakil might consider necessary for insertion in a formal document.*

Having said that, however, we consider that the case which is especially relevant to the facts and circumstances of the present appeal is *Crossley v. Maycock* (1874) 43 LJ CH 379; (1874) LR 18 Eq 180 where Sir George Jessel MR said:

If the agreement is made subject to certain conditions then specified or to be specified by the party making it or his solicitor, then until those conditions are accepted, there is no final agreement such as the court will enforce.

In the present appeal, it is important to note that the opening paragraph in the letter of 19 September 1984, containing as it does the vital qualifying clause: 'subject to the following terms and conditions', and, in particular, condition (vi) which states quite categorically:

… that the above terms and conditions in the form of an agreement between YC Chin Enterprises and AHTD and that appropriate indemnity clauses in favour of AHTD in respect of material defects in site work, foundation and buildings in the project be incorporated in the said agreement.

In our view, having regard to the several essential matters which still remained to be settled between the parties to which we have referred and the letter of 19 September 1984 with its vital qualifying clause, 'subject to the following terms and conditions', one of which was condition (vi) aforesaid, the present case falls within the principle enunciated by Sir George Jessel MR in *Crossley v. Maycock*.

It follows that the letter of 19 September 1984 on its true construction did not constitute a contract binding in law upon the plaintiff and the defendant but was only a record of terms upon which they were agreed as a basis for the negotiations of a contract. It may aptly be called a letter of intent, the characteristics of which have been accurately described by Fay J at first instance in his judgment in *Turriff Construction Ltd* and *Turriff Ltd v. Regalia Knitting Mills Ltd* 18 at p 22 para 3 thus:

A As I understand it such a letter is no more than the expression in writing of a party's present intention to enter into a contract at a future date. Save in exceptional circumstances it can have no binding effect. Later, in his judgment, he restated this proposition (at p 22 para 4) thus:

B A letter of intent would ordinarily have two characteristics, one, that it will express an intention to enter into a contract in future and, two, it will itself create no liability in regard to that future contract.

C *We would add that we have not overlooked the fact that the plaintiff had, after the receipt of the letter of 19 September 1984, conducted itself as if it considered that a contract binding in law had been concluded, as evidenced by the steps it had taken in that direction to which we have referred. However, this does not really assist in deciding the question of construction of the letter of 19 September 1984 for reasons we now give.*

D *Looking back, our analysis of the factual matrix in the present appeal is that both the plaintiff and the defendant were optimistic about a formal contract being executed pursuant to the letter of 19 September 1984 and, so, to expedite performance under that contract, the plaintiff, with the knowledge, though not necessarily at the request of the defendant, had commenced the preliminary works hereinbefore mentioned.*

E *The liability of the defendant to the plaintiff in respect of the execution of such preliminary works would, therefore, be on a quantum meruit basis and, provided always, that such liability shall not exceed the sum of RM300,000, having regard to para (v) of the letter of 19 September 1984. The authority which we should like to refer to in support of this conclusion is British Steel Corp v. Cleveland Bridge & Engineering Co Ltd 19 (at p 121 last para to*

F *p 122 para 1) where Robert Goff J (as he then was) said this:*

In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If

G *thereafter – as anticipated – a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract of which the terms can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been*

H *done pursuant to that request, such an obligation sounding in quasi-contract or, as we now say, in restitution.*

Consistently with that solution, the party making the request may find himself liable to pay for work which he would not have had to pay for as such if the anticipated contract had come into existence, eg, preparatory work

I *which will, if the contract is made, be allowed for in the price of the finished work (cf William Lacey (Hounslow) Ltd v. Davis [1957] 1 WLR 932). This solution moreover accords with authority, eg the decision in Lacey*

v. Davis (above); the decision of the Court of Appeal in the unreported case of Sanders & Forster Ltd v. A Monk & Co Ltd (6 February 1980), though that decision rested in part on a concession; and the crisp dictum of Parker J in OTM Ltd v. Hydranautics [1981] 2 Lloyd's Rep 211 at p 214, when he said of a letter of intent that 'its only effect would be to enable the defendants to recover on a quantum meruit for work done pursuant to the direction' contained in the letter. (emphasis added)

[53] In *YC Chin Enterprises Sdn Bhd* (*supra*), the Supreme Court awarded damages on a *quantum meruit* basis for the preliminary works on the site up to a limit of RM300,000 as set out in the letter of intent.

[54] Having regard to the circumstances narrated above for the instant case, the next critical issue is whether the representation embodies any (contractual) obligations between the parties.

[55] Shorn of all the trimmings, this action in pith and substance, is to call upon D7 to make good on its representation pleaded in paras. 9 and 9(i) of its statement of claim so as to enable P1 to bring its investment in the State of Perak into fruition by allowing utilities to be available for connection to the factory and production to commence. I have held that such a representation was made.

[56] However, in my considered opinion, the representation is one of innocent misrepresentation where the relief lies in equity, see: *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227; [2003] 3 MLJ 460 (CA).

[57] Sitting as a court of equity, this court may mould the relief that is to be granted to P1 premised upon the particular facts of the case, see: *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679; [2005] 2 MLJ 42 (CA).

[58] Under s. 29(1)(a) of the Government Proceedings Act 1956 (Revised 1988) Act 359, it is expressly provided that:

1. In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

   Provided that:

   a. where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, **the court shall not grant an injunction or make an order for specific performance, but may *in lieu* thereof make an order declaratory of the rights of the parties.**

   b. … (emphasis added)

[59] During the presentation of oral submissions made on 7 March 2023, learned lead counsel for the plaintiffs candidly conceded that in the representation made on 30 March 2006, no timelines were made as to when the infrastructure would be supplied, and what are the specifications of the infrastructure and how they are to be supplied. On the materials before this court, I find that the alleged contract to be not certain or capable of being made certain and therefore void for uncertainty, see: s. 30 of the Contracts Act 1950 (Revised 1974) (Act 136).

[60] Having found that the alleged contract to be void, s. 66 of the Contracts Act 1950 comes up for consideration. It provides that any person who has received any advantage under an agreement discovered to be void is bound to make compensation or restitution, see: *Sik Hong Photo Sdn Bhd v. Ch'ng Beng Choo* [2010] 5 CLJ 427; [2010] 3 MLJ 633 (CA) paras. [30] to [33].

[61] It cannot be denied that P1 had entered into a sale and purchase agreement with PKNP for the purchase of a piece of land which has been transferred into the name of P1 and upon which it has proceeded to construct its factory.

[62] There is compelling evidence that the infrastructure which was to be provided under the representation has yet to be provided. I observed that in para. 9A of its statement of claim, the plaintiffs asserted that it has incurred costs of RM42.23 million and continuing, for the supply of 132 kV electricity. Whether such costs were lawfully expended would have to be proved.

[63] Guided by:

(i) *Sim Thong Realty Sdn Bhd* (*supra*) to the extent that no damages are to be awarded in a case of innocent misrepresentation;

(ii) *Admiral Cove Development Sdn Bhd v. Balakrishnan Devaraj & Anor* [2011] 9 CLJ 133; [2011] 5 MLJ 309 (FC) para. [21] – "A representee who had been induced by an innocent misrepresentation may sue for rescission and consequent restitution if the contract was still executory and if all parties could be restored to their original position. **However, such remedy was not available where dealings in land were concerned where the conveyance had been properly executed by both vendor and purchaser** (see paras. 21 & 32)";

(iii) that there is a prohibition against the grant of an injunction or specific performance under s. 29 of the GPA against a government, but that the court may *in lieu* thereof make an order declaratory of the rights of the parties; and

(iv) *Sinar Wang Sdn Bhd* (*supra*) that the court may mould the relief premised upon the particular facts of the case.

this court grants the following reliefs:

(i) an order declaring that D7 had made the representation to make available access roads, supply of water, gas and the provision of 132 kV electricity up to the boundary of the factory built by P1 at Lot 2, Kamunting Raya Industrial Estate, Jalan Logam 6, Kamunting, Taiping, Perak ready for connection and commissioning subject always that P1 shall be liable to pay for any utilities including that of water, gas and electricity, consumed within the boundaries of the factory;

(ii) D7 is to pay compensation to P1 for any expenses incurred by P1 in making available access roads, supply of water, gas and the provision of 132 kV electricity up to the boundary of Lot 2 on a *quantum meruit* basis to be assessed but without interest. No interest is awarded because in *Admiral Cove Development Sdn Bhd v. Balakrishnan Devaraj & Anor* [2011] 9 CLJ 133; [2011] 5 MLJ 309 (FC) at para. [21] the Federal Court held that:

> The defendant is not entitled to interest on the sum of RM254,204. *To award interest would amount to compensating the defendant for the loss of the use of his money while it was in the plaintiffs hands. This, in our view, would amount to an award of damages.*
>
> (emphasis added)

(iii) there be liberty to apply.

[64] What good would a mere declaratory order be, it may be asked.

[65] In *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 (FC) at 146 and 147, Suffian LP writing for the Federal Court said:

> First, in my experience, no Government department or ministry has ever set the courts at defiance. Secondly, it would not be out of place to reproduce the following words from the judgment of the Privy Council at page 28 in *Fischer v. Secretary of State for India* 1979] 1 MLJ 135 at 147:
>
> *But then, it was asked, what would happen if the Collector ignored the order of the Court?* What remedy would the appellant have if he had omitted to ask for specific relief against the Collector? *It is highly improbable that any officer of the Government would set the Court at defiance. It is impossible to suppose that the Government would countenance such conduct as that.* But the remedy in such a case, if it did occur, would be simple enough. *Every order such as that which the appellant asks for carries with it liberty to apply. On a proper application and on proper notice being given it would be found that the arm of the Court would be long enough to reach the offender, whatever his position might be.*
>
> (emphasis added)

[66] In the circumstances, P1 has succeeded in its claim for a declaratory order against D7 on the representation with an order for it to be compensated by way of restitution for costs incurred by P1 in constructing any part of the infrastructure as promised in the representation on a *quantum meruit* basis to be assessed.

[67] However, the plaintiffs have failed in their claim as against D4 to D6 and have also failed substantially in their claim for the huge amount of damages of more than RM1.95 billion as against D4 to D6. Wherefore, I think it is appropriate that there be no order as to costs for this action up to the date of this judgment and I so order. However, costs for the assessment of compensation on a *quantum meruit* basis is to be borne by D7 to be paid to P1 and to be determined at the time of the assessment of the compensation and to be paid by D7 to P1.

Conclusion

[68] Wherefore the court gives the following judgment:

(i) an order declaring that D7 had made the representation to make available access roads, supply of water, gas and the provision of 132 kV electricity up to the boundary of Lot 2, Kamunting Raya Industrial Estate, Jalan Logam 6, Kamunting, Taiping, Perak where P1's factory is being constructed ("Lot 2") and ready for connection and commissioning subject always that P1 shall be liable to pay for any utilities including that of water, gas and electricity, consumed within the boundaries of Lot 2;

(ii) D7 is to pay compensation to P1 for any expenses incurred by P1 in making available access roads, supply of water, gas and the provision of 132 kV electricity up to the boundary of Lot 2 on a *quantum meruit* basis to be assessed;

(iii) subject to iv) below, there is no order for costs up to the stage of this action namely up to the delivery of this judgment;

(iv) costs for the assessment of compensation on a *quantum meruit* basis of ii) above is to be determined at the time of the assessment of the compensation and is to be paid by D7 to P1; and

(v) there be liberty to apply.